

Individual FAR Deviations by the Procurement Executive

In Support of the National Labor Relations Board Acquisition: Information Technology Infrastructure and End-User Support Services

AUTHORITY

The Procurement Executive has the authority to issue individual deviations to the Federal Acquisition Regulations (FAR). FAR 1.403 provides that individual deviations may be authorized by agency heads or their designees. The deviations requested and approved herein will permit initiation of the acquisition process for the named acquisition. If the acquisition process results in the need for multiple contracts, supplemental deviations will be required to be submitted and approved for each contract action.

BACKGROUND

The National Labor Relations Board has assigned a Project Team to work with the United States Patent and Trademark Office to implement their re-engineered acquisition process called ReMap.

The ReMap process evolved from the Department of Commerce's CONOPS approach to acquisitions. The CONOPS and the ReMap are products of cross-functional teams of departmental representatives who extensively reviewed private and public sector acquisition practices and recommendations. These reengineered practices streamlined the Department of Commerce's and the Patent and Trademark Office's acquisition processes. They provided significant benefits to the vendor community and the agency by reducing the time and effort required to complete the acquisition cycle and by providing an opportunity for substantially increasing the value of acquisition products.

The new processes are also designed to be fair, to increase the public's insight into the Government's mission objectives and acquisition processes and to increase the range of potential approaches and capabilities which may compete to meet a particular Agency's need. Nothing in this deviation request seeks or authorizes permission to deviate from federal statutes.

PROPOSED DEVIATIONS

In order to implement the ReMap acquisition approach as conveyed by the Patent and Trademark Office, the following deviations from the Federal Acquisition Regulations (FAR) are required.

1. FAR Subparts 10 and 11. Minimum Needs.

Discussion:

One of the premises of the Department of Commerce's CONOPS process was to seek early involvement of the private sector in the acquisition process, and to maximize competition and promote innovative solutions wherever practicable by stating requirements in the form of a statement of need in terms of mission/project objectives rather than a detailed statement of work. While the recommended practice appears to be consistent with the intent of the FAR, the use of the term "minimum needs" (FAR 10.004(a)(1)) as well as the numerous references to requirements, specifications, purchase descriptions, etc. in Subparts 10 and 11 create ambiguity and are interpreted by some to preclude adoption of the recommended approach.

Deviation Requested:

Nothing in FAR Subparts 10 or 11 will be construed to prohibit the expression of requirements in terms of mission or project needs (rather than detailed statements of work) together with appropriate guidance to potential sources, as a basis for soliciting and evaluating proposed approaches, capabilities and proposals, for the purpose of downselecting for negotiation, as needed, and award.

Approved by Gloria Joseph May 5, 1999 (signed)

2. FAR Subparts 5, 6, 10 and 15. Publicizing, market research, competition, solicitation, proposal and competitive range requirements.

Discussion:

The Department of Commerce's CONOPS and the Patent and Trademark Offices ReMap processes are based on a two-phased approach to meeting mission/project needs which combines market research and solicitation into a single process. The initial phase involves release of a description of the project objectives and ground rules for receipt and down-selection among competing approaches, capabilities, etc. Upon conclusion of the initial phase, only those sources considered likely candidates for award will be invited to participate in the second phase during which more detailed proposals and discussions will occur. The intent is to meet requirements for full and open competition while limiting the extent of solicitation and proposal preparation, evaluation and negotiation to that which contributes significantly to the achievement of project objectives and the opportunity for private sector sources to participate in those objectives.

Negotiations will be concluded when the Project Team is satisfied that it has reached agreement on contract terms and conditions with a source which has been determined to be the source most likely to provide the best value performance in relation to the Government's needs, with due consideration to fairness in providing sources the

opportunity to present their offers. Additional streamlining is sought through the elimination of announcement of the close of negotiations and the use of best and final offers. Offerors will be expected to make their best proposals available at appropriate times during the process without a need for a final call.

Deviation Requested:

A deviation from the provisions of FAR Subparts 5, 6, 10 and 15 is requested which will allow the National Labor Relations Board to combine publicizing, market research and solicitation into a single two-phased process as outlined above and described more fully in the Department of Commerce's Acquisition CONOPS and Narratives. Pursuant to this deviation, the agency may meet publicizing requirements by publishing the Project Agreement or a notice of its availability in the CBD, and meet the requirement for full and open competition by inviting all responsible sources to submit information regarding their qualifications and approach to meeting the agencies objectives as described in the Project Agreement.

Features specifically permitted include, but are not limited to, the ability of the National Labor Relations Project Team:

- (1) during the initial phase to down-select among sources on the basis of capabilities, approach, past performance and other criteria as specified in the published Project Agreement and Ground Rules, without the necessity of receiving or reviewing detailed technical proposals;
- (2) to continue market research and initiate solicitation by issuance of the Project Agreement during the initial phase of the acquisition process;
- (3) to invite only those sources to participate during the second phase who were found to have a reasonable likelihood of receiving a contract award as a result of their participation during phase one;
- (4) to conclude negotiations at any time after receipt of vendor information during phase two, in accordance with published ground rules and criteria, and to conduct and conclude discussions without the need to notify the sources in advance of the date and time for conclusion of discussions, or to request best and final offers;
- (5) to deviate from the Uniform Contract Format and to deviate from or omit solicitation and contract terms and conditions prescribed by the FAR as necessary and appropriate to reflect the streamlined processes upon which this deviation is based, except where and to the extent required by statute; and

- (6) to down-select among proposals and sources and eliminate sources where there is significant doubt as to whether a proposal has a reasonable chance of being selected for award.

Approved by Gloria Joseph May 5, 1999 (signed)

3. FAR Subparts 15, 16 and 42. Contract Type and Required Audit Sources.

Discussion:

Current regulations have a preference for use of fixed price and cost-based contracts over labor hour and time and materials contracts and require use of Government audit agencies to conduct contractor cost audits. It is our intent to reduce the need for pre and post-award cost audits by utilizing cost based contracting only as a last resort and utilizing fixed-price and labor hour or time and materials types for task order and incremental development method (IDM) contracts, as described in the CONOPS, instead. When audits are needed these would be obtained utilizing commercial auditing capabilities, e.g., reputable private sector Certified Public Accountants (CPAs), instead of Government audit agencies. This will be less expensive and administratively less burdensome for both the agency and the contractor.

Deviation Requested:

A deviation from FAR provisions is requested to permit use of appropriate contract type without necessity of preparing a determination and findings that no other type is more suitable. Also a deviation is requested which will permit the use of private sector CPAs to perform audits instead of Government audit agencies.

Approved by Gloria Joseph May 5, 1999 (signed)